

STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 7440

Petition of Entergy Nuclear Vermont Yankee, LLC, and)
Entergy Nuclear Operations, Inc., for amendment of)
their Certificates of Public Good and other approvals)
required under 10 V.S.A. §§ 6501-6504 and 30 V.S.A.)
§§ 231(a), 248 & 254, for authority to continue after)
March 21, 2012, operation of the Vermont Yankee)
Nuclear Power Station, including the storage of spent-)
nuclear fuel –)

Order entered: 3/19/2012

ORDER RE ENTERGY VY MOTION FOR DECLARATORY RULING

I. INTRODUCTION

On March 13, 2012, Entergy Nuclear Vermont Yankee, LLC ("EVY" or "ENVY"), and Entergy Nuclear Operations, Inc. ("ENO" and, together with EVY, "Entergy VY"), filed a "Motion for Declaratory Ruling Concerning 3 V.S.A. § 814(b) and Chapter 157 of Title 10 of the Vermont Statutes Annotated" ("Declaratory Ruling Motion"). In the Declaratory Ruling Motion, Entergy VY requests that the Public Service Board ("Board") issue an order declaring that:

- (1) Pursuant to 3 V.S.A. § 814(b), the Vermont Yankee Nuclear Power Station ("Vermont Yankee") may continue operating, and storing spent nuclear fuel derived from such operation, while its petition for a new or amended certificate of public good remains pending.
- (2) 10 V.S.A. § 6522(c)(2) does not require that the General Assembly approve the storage of spent nuclear fuel derived from post-March 21, 2012 operation of Vermont Yankee.
- (3) 10 V.S.A. § 6501 does not apply because petitioners do not presently propose to construct or establish a new facility for the storage of spent nuclear fuel at the Vermont Yankee site.

By memorandum issued March 14, 2012, the Public Service Board ("Board") established a deadline of noon, March 19, 2012, for responses to the Declaratory Ruling Motion.

On March 16, 2012, the Department of Public Service ("Department"), the New England Coalition, Inc. ("NEC"), Conservation Law Foundation ("CLF"), and the Vermont Public Interest Research Group ("VPIRG"), each filed a response to the Declaratory Ruling Motion. The Vermont Natural Resources Council ("VNRC") and the Connecticut River Watershed Council ("CRWC") filed a joint response to the motion.

For the reasons set forth in this Order, we deny Entergy VY's Declaratory Ruling Motion.

II. BACKGROUND

A. Prior Board Proceedings

The determinations that Entergy VY seeks in its Declaratory Ruling Motion arise from commitments Entergy VY made in Docket 6545, conditions the Board adopted in that case and in Docket 7082 (the dry-cask proceeding), as well as the legislative changes that enabled the Board to conduct the latter proceeding. We briefly describe the relevant history.

1. Sale of VYNPC – Docket 6545

The Vermont Yankee Nuclear Power Station ("Vermont Yankee") began operating 40 years ago. It was owned by Vermont Yankee Nuclear Power Corporation ("VYNPC"); two Vermont utilities, Green Mountain Power Corporation ("GMP") and Central Vermont Public Service Corporation ("CVPS") owned more than 50% of the shares of VYNPC.

In 2001, Entergy VY, VYNPC, GMP, and CVPS requested approval from the Board of several transactions under which Vermont Yankee (but not VYNPC) would be sold to Entergy VY. The Board opened Docket No. 6545 to consider this request. At the time of the proposed sale, CVPS maintained a 35% ownership stake; GMP owned 20% of VYNPC.¹

During the course of the proceeding, Entergy VY entered into a Memorandum of Understanding ("MOU") with the Department that resolved their differences and resulted in the

1. Docket No. 6545, Order of 6/13/02 at 13.

Department supporting approval of the transactions. Among the conditions of the MOU was paragraph 12, which states:

12. Board Approval of Operating License Renewal: The signatories to this MOU agree that any order issued by the Board granting approval of the sale of VYNPS to ENVY and any Certificate of Public Good ("CPG") issued by the Board to ENVY and ENO will authorize operation of the VYNPS only until March 21, 2012 and thereafter will authorize ENVY and ENO only to decommission the VYNPS. Any such Board order approving the sale shall be so conditioned, and any Board order issuing a CPG to ENVY and ENO shall provide that operation of VYNPS beyond March 21, 2012 shall be allowed only if application for renewal of authority under the CPG to operate the VYNPS is made and granted. Each of VYNPC, CVPS, GMP, ENVY and ENO expressly and irrevocably agrees: (a) that the Board has jurisdiction under current law to grant or deny approval of operation of the VYNPS beyond March 21, 2012 and (b) to waive any claim each may have that federal law preempts the jurisdiction of the Board to take the actions and impose the conditions agreed upon in this paragraph, to renew, amend or extend the ENVY CPG and ENO CPG to allow operation of the VYNPS after March 21, 2012, or to decline to so renew, amend or extend.

In testimony supporting the MOU, Entergy VY stated:

ENVY agrees that the order in this case may state that operation of the VY Station beyond its current operating license termination date (March, 2012) is not permitted and will be allowed only if application to the Board for renewal of the CPG is made and granted. ENVY and ENO expressly and irrevocably agree to waive any claim they or their affiliates may have that the jurisdiction of the Board to issue the CPG is preempted by federal law.²

This view was augmented by Entergy VY's brief, which stated: "In its prefiled testimony and in the MOU, ENVY and ENO have committed that they *will not attempt to operate the VY Station beyond its current term without obtaining an extension or renewal of its CPG* from the Board."³

This condition, and Entergy VY's supporting testimony and argument, helped address concerns raised during the proceeding that the sale would result in a loss of Board authority to influence whether Vermont Yankee would be relicensed in the future.⁴ Although the Board did not directly regulate Vermont Yankee, under ownership by VYNPC, the Board retained some

2. Wells pf. reb. at 7-8.

3. Docket 6545, Entergy VY Initial Brief at 12 (emphasis added).

4. See Docket No. 6545, Order of 6/13/02 at 78-82.

authority, primarily though its ability to regulate the two Vermont utilities that owned a majority of the plant. Sale to Entergy VY would have eliminated that source of authority. Entergy VY's agreement to the MOU clarified and maintained the Board's jurisdiction. We observed that a

very significant enhancement is ENVY's agreement in the MOU that its Certificate will terminate in 2012 and that this Board will have the full authority to review any request by ENVY to extend its license for an additional period of time. . . . By entering into a binding contractual commitment with the Department, upon which we expressly rely in reaching our decision today, ENVY has eliminated much of the jurisdictional uncertainty.⁵

The Board reflected Entergy VY's MOU commitments in the final Order. First, we approved the MOU (subject to certain modifications that are not germane to the issues before us today). Entergy understood that the adoption of the condition approving the MOU made it directly enforceable by the Board. In oral argument related to a later motion to amend, Entergy VY counsel stated:

[I]f Entergy violates any conditions of the CPG or the MOU, [the Board and Department] have recourse against the company. You have the right to haul us in and take away the CPG if it's significant enough.⁶

The Board also adopted Conditions 7 and 8, which directly addressed the limits on Entergy VY's ability to operate the station that were being imposed as a condition of the sale.

7. Pursuant to 30 V.S.A. § 231, a Certificate of Public Good, to expire on March 21, 2012, shall be issued to Entergy Nuclear Vermont Yankee, LLC to own the Vermont Yankee Nuclear Power Station and to Entergy Nuclear Operations, Inc. to operate the Vermont Yankee Nuclear Power Station as described in the foregoing findings.

8. Absent issuance of a new Certificate of Public Good or renewal of the Certificate of Public Good issued today, Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc. are prohibited from operating the Vermont Yankee Nuclear Power Station after March 21, 2012.⁷

5. Docket No. 6545, Order of 6/13/02 at 82. Entergy VY's motion does not request a ruling that its contractual obligations under the MOU are affected by operation of 3 V.S.A. § 814(b). As a result, we have not examined the MOU and whether a party to the MOU may be able to seek enforcement of the obligations thereunder.

6. Docket No. 6545, Order of 7/11/02 at 26, citing tr. 7/2/02 at 59 (Brown).

7. Docket No. 6545, Order of 6/13/02 at 159.

Neither of these conditions appear in the CPG. The Board made clear that the approval of the sale transaction and the issuance of a CPG to expire on March 21, 2012, relied upon Entergy VY's MOU commitments (which are also enforceable contractually).

ENVY also agrees, through the MOU, that the Board has complete jurisdiction to decide whether to renew ENVY and ENO's Certificates of Public Good ("Certificate") if ENVY seeks to extend its operating license past the expiration of its present term. This clarification of authority and the contractual commitment with the Department (on which our approval relies) provide assurances to Vermont that ENVY and ENO cannot thwart state review if ENVY plans to operate Vermont Yankee beyond 2012.⁸

As issued, the CPG authorized Entergy VY to own and operate Vermont Yankee, but, consistent with the MOU specified that the CPG would expire on March 21, 2012. Entergy VY and VYNPC sought clarification of the language in the CPG. These parties asserted that Entergy VY had continuing obligations to decommission Vermont Yankee after it finished operations and that these obligations extended beyond the March 21, 2012, expiration date. Accordingly, they requested modification of the CPG to authorize Entergy VY to continue to own and operate Vermont Yankee beyond that date for the sole purpose of decommissioning the station. We granted the requested modification, adding the following language:

Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc. are authorized to own and operate Vermont Yankee beyond March 21, 2012, solely for purposes of decommissioning.⁹

2. Dry-Cask Storage – Docket 7082

Within a few years of purchasing Vermont Yankee, Entergy VY modified the station to increase its generating capacity by 20%; this was termed a power uprate. The Board approved Entergy's power uprate in Docket No. 6812.¹⁰ Increasing the power output, however, also increased the rate at which Entergy VY would use fuel, which meant that the capacity of the spent fuel pool at Vermont Yankee would be exhausted before the end of the operating license in

8. Docket No. 6545, Order of 6/13/02 at 9.

9. Docket No. 6545, Order of 7/11/02 at 17.

10. Docket 6812, Order of 4/26/12.

2012. Entergy VY, therefore, determined that it needed to construct a dry-cask storage facility at the Vermont Yankee site.

Under Vermont law as it then existed, however, Entergy could not construct such a facility absent legislative authorization. Specifically, Section 6501(a) of Title 10 provided that:

No facility for deposit, storage, reprocessing or disposal of spent nuclear fuel elements or radioactive waste material shall be constructed or established in the state of Vermont unless the general assembly first finds that it promotes the general good of the state and approves, through either bill or joint resolution, a petition for approval of the facility.¹¹

This prohibition did not apply to all such storage facilities. The legislature exempted any nuclear generating facility approved under 30 V.S.A. § 248(e)¹² and the storage of spent nuclear fuel by VYNPC at its existing site.¹³ Neither of these exceptions applied to Entergy VY.

Entergy VY worked with the legislature to secure adoption of Act 74 (2005). The primary effect of this Act was not to increase regulation of Vermont Yankee, but to remove the long-standing prohibition against construction of a spent-fuel storage facility, subject to certain conditions. Entergy VY was required to obtain approval from the Board under Section 248 of Title 30 prior to construction of such a facility. The legislature set forth several standards for the Board to examine in addition to the normal Section 248 criteria.¹⁴ The legislature specified several limiting conditions. These included the following that are relevant to the Declaratory Ruling:

(2) Any certificate of public good issued by the board shall limit the cumulative total amount of spent fuel stored at Vermont Yankee to the amount derived from the operation of the facility up to, but not beyond, March 21, 2012, the end of the current operating license. Authorized capacity may include on-site storage capacity to accommodate full core offload or any order or requirement of the Nuclear Regulatory Commission with respect to the fuel derived from these operations.

(5) Compliance with the provisions of this subchapter shall not confer any expectation or entitlement to continued operation of Vermont Yankee following the expiration of its current operating license on March 21, 2012. Before the

11. This section had been adopted in 1977.

12. 10 V.S.A. 6503(d).

13. 10 V.S.A. § 6505. The prohibition was explicit to VYNPC, which no longer owns Vermont Yankee.

14. 10 V.S.A. 6522(b).

owners of the generation facility may operate the generation facility beyond that date, they must first obtain a certificate of public good from the public service board under Title 30.

In Section 6522(c)(4), the legislature also provided that any storage of spent fuel from operation after March 21, 2012, required further legislative approval. The federal District Court has ruled this provision to be preempted by federal law.¹⁵

Based upon the enactment of Act 74, the Board proceeded to consider Entergy VY's petition for permission to construct a dry-cask storage facility.¹⁶ The Board approved the construction in an Order issued April 26, 2006. That Order and CPG included two conditions of relevance to the Declaratory Ruling:

4. The cumulative total amount of spent nuclear fuel stored at Vermont Yankee is limited to the amount derived from the operation of the facility up to, but not beyond, the end of the current operating license, March 21, 2012. This capacity may include on-site storage capacity to accommodate full core offload or any order or requirement of the Nuclear Regulatory Commission with respect to the fuel derived from these operations.

7. Compliance with the provisions of the Certificate of Public Good and this Order shall not confer any expectation or entitlement to continued operation of Vermont Yankee following the expiration of its current operating license on March 21, 2012. Before Entergy VY, its successors or assigns, may operate the facility beyond that date, the owners must first obtain a Certificate of Public Good from the Board under Title 30.

B. Federal District Court Proceeding

On April 18, 2011, Entergy VY filed suit in federal District Court challenging certain of Vermont statutes regulating Vermont Yankee.¹⁷ On January 20, 2012, the United States District Court for the District of Vermont entered a Decision and Order on the Merits of Plaintiffs'

15. *Entergy Nuclear Vermont Yankee and Entergy Nuclear Operations, Inc. v. Shumlin, et al*, Docket No. 1:11-cv-99, at 99 (1/19/12, U.S. Dt. Ct. Vt.).

16. Absent enactment of Act 74, the Board had no authority to allow Entergy VY to construct such a facility due to the absolute bar in Section 6501(a) of Title 10 which had been in place since 1977.

17. *Entergy Nuclear Vermont Yankee, LLC, and Entergy Nuclear Operations, Inc. v. Shumlin et al*, Docket No. 1:11-cv-99.

Complaint.

In its Decision and Order, the federal District Court held that Act 160 (P.A. No. 160, 2006 Vt., Adj. Sess.) is preempted, as is the single sentence in 10 V.S.A. § 6522(c)(5) that provided, "Storage of spent nuclear fuel derived from the operation of Vermont Yankee after March 21, 2012 shall require the approval of the general assembly under this chapter." The District Court's Decision and Order also awarded Entergy VY the following permanent injunctive relief:

1. Defendants are permanently enjoined, as preempted under the Atomic Energy Act, from enforcing Act 160 by bringing an enforcement action, or taking other action, to compel Vermont Yankee to shut down after March 21, 2012 because it failed to obtain legislative approval (under the provisions of Act 160) for a Certificate of Public Good for continued operation, as requested by Plaintiffs' pending petition in Public Service Board Docket No. 7440, or in any subsequent petition.
2. Defendants are permanently enjoined, as preempted under the Atomic Energy Act, from enforcing the single provision within section 6522(c)(4) of title 10, enacted as part of Act 74, stating "Storage of spent nuclear fuel derived from the operation of Vermont Yankee after March 21, 2012 shall require the approval of the general assembly under this chapter," by bringing an enforcement action, or taking other action, to compel Vermont Yankee to shut down or to prevent storage of spent nuclear fuel after March 21, 2012 because it failed to obtain legislative approval (under the same preempted provision) for a Certificate of Public Good for storage of spent fuel, as requested by Plaintiffs' pending petition in Public Service Board Docket No. 7440, or in any subsequent petition.
3. Defendants are permanently enjoined, as prohibited by the dormant Commerce Clause, from conditioning the issuance of a Certificate of Public Good for continued operation on the existence of a below-wholesale-market power purchase agreement between Plaintiffs and Vermont utilities, or requiring Vermont Yankee to sell power to Vermont utilities at rates below those available to wholesale customers in other states.¹⁸

18. *Entergy Nuclear Vermont Yankee, LLC, Entergy Nuclear Operations, Inc. v. Shumlin et al*, Docket No. 1:11-cv-99, slip op. at 100–101 (D. Vt. Jan. 20, 2012).

III. POSITIONS OF THE PARTIES

A. Entergy VY¹⁹

Entergy VY asserts that in 2008 it filed a timely petition for renewal of its CPG, and that accordingly 3 V.S.A. § 814(b) provides that its existing CPG does not expire until the Board has made a final determination on its petition for a renewed CPG. Entergy VY maintains, further, that at the time the Docket 6545 MOU was executed by the signatories and approved by the Board:

neither the parties nor the Board could have reasonably anticipated the subsequent enactment of Act 74 and Act 160. In 2002, the parties and the Board instead had every reason to expect that the Board would be able to decide, in accordance with the Board's normal administrative processes, any CPG application that Entergy VY might file. Act 74 and Act 160, however, interposed legislative-approval requirements that defeated these expectations of the parties and the Board. In these circumstances, interpreting the quoted provisions of the 2002 MOU in the literal manner suggested by the question [Question 4(d) in the Board's February 22 memorandum] would be inconsistent with the intent of the parties and the Board. Further, these provisions also cannot be applied in that literal manner consistent with the District Court Decision because requiring Entergy VY to obtain a new or amended CPG prior to March 22, 2012, would penalize it for the delays in the CPG-approval process caused by the preempted legislative-approval requirements in Act 74 and Act 160 that the District Court has permanently enjoined.²⁰

Entergy VY contends that the provisions of Section 814(b) as applied to its CPG have not been displaced by the enactment of Section 6522(c)(5).²¹ According to Entergy VY, Section 6522(c)(5) neither expressly nor impliedly demonstrates any statutory intent to repeal Section 814(b) as applied to Vermont Yankee. Entergy VY maintains that to read Section 6522(c)(5) as

19. Entergy VY's memorandum of law in support of its Declaratory Ruling Motion did not directly present Entergy VY's arguments in support of its three requested rulings, and instead incorporated by reference various sections of Entergy VY's March 7, 2012, response to questions that the Board had asked in a February 22, 2012, memorandum. Because the three requested declaratory rulings do not directly correspond to the Board's February 22 questions, it has at times been challenging to ascertain fully Entergy VY's arguments in support of its requested rulings. We expect parties to our proceedings, particularly parties seeking rulings of significance to themselves, to provide better organized and more cogent briefing.

20. Entergy VY Declaratory Ruling Motion, Attachment at 12.

21. Section 6522(c)(5) provides: "Compliance with the provisions of this subchapter shall not confer any expectation or entitlement to continued operation of Vermont Yankee following the expiration of its current operating license on March 21, 2012. Before the owners of the generation facility may operate the generation facility beyond that date, they must first obtain a certificate of public good from the public service board under Title 30."

overriding Section 814(b) would "effectively reinstate the legislative-approval requirement that the District Court held to be preempted and permanently enjoined," and would "unfairly punish Entergy VY for the delay caused by the presence in Vermont statutory law of now-invalidated provisions that prevented the Board from making a final determination on Entergy VY's timely-filed petition or a new or amended CPG."²² Entergy VY also claims that it would be "unfair and unjust" to conclude that Section 6522(c)(5) displaces Section 814(b), because Entergy VY in its post-trial brief in federal court referred to the application of Section 814(b) to Entergy VY's CPG application, and the state defendants did not dispute that reference.

Entergy VY asserts that 10 V.S.A. § 6501 only applies to the construction or establishment of a facility for storage of spent nuclear fuel ("SNF"), and thus does not apply to its already-constructed SNF facility. Entergy VY claims that Section 6522(c)(2) does not require General Assembly approval for storage of SNF from post-March 21, 2012, operation because the federal district court's decision viewed Section 6522(c)(4) as the only provision establishing such a requirement, and with the invalidation of that section, "there is no statutorily-based authority for the General Assembly or the Board to regulate storage of spent fuel derived from post-March 21, 2012, operations in an already-constructed facility."²³

B. Department

The Department asserts that 10 V.S.A. § 6522(c)(2) does not prevent the Board from ruling on storage of SNF derived from post-March 21 operation. According to the Department, now that the federal District Court has invalidated the sentence in 10 V.S.A. § 6522(c)(4) that required legislative approval for storage of amounts of SNF generated after March 21, the Board continues to have authority, at least under 30 V.S.A. § 231, to grant a CPG for such storage of such additional SNF.

The Department also contends that to the extent that 3 V.S.A. § 814(b) does not apply to any Board orders at issue here, the Board is nonetheless enjoined by the federal district court decision from enforcing orders that would require cessation of operations at Vermont Yankee.

22. Entergy VY Declaratory Ruling Motion, Attachment at 10.

23. Entergy VY Declaratory Ruling Motion, Attachment at 4 (footnote omitted).

Finally, in its March 16 filing, the Department cross-moves "for a declaratory ruling that all aspects of the CPGs issued in Docket 6545, 6812 and 7082, including the substantial obligations associated with those CPGs, remain in effect pending a final decision by this Board."²⁴

C. CLF

CLF asserts that Entergy VY lacks authority to store at Vermont Yankee spent fuel generated after March 21, 2012. Citing *Trybulski v. Bellows Falls Hydro-Electric Corp.*, 112 Vt. 1 (1941) (hereinafter "*Trybulski*"), CLF maintains that it is well-established law that an administrative agency only possesses such authority as has been granted it by statute. CLF contends that 10 V.S.A. § 6522(c)(2) requires that any CPG issued by the Board for SNF at Vermont Yankee must limit the total amount of SNF stored to the amount derived from operation up to but not past March 21, 2012.²⁵ According to CLF, "[t]he plain language of the Vermont statute precludes the Board from authorizing any storage of [spent] fuel generated after March 21, 2012."²⁶

CLF contends that 3 V.S.A. § 814(b) serves only to continue an existing license or approval pending a determination on a new license or approval. Because Section 814(b) continues the existing approvals, CLF maintains that the existing conditions of such approvals continue to apply. CLF points to the following language in the Board's July 11, 2002, Order re Motions to Alter in Docket 6545:

If Entergy expects to operate lawfully under its CPG, then it must comply with all its terms, including those that were added by the Board in its July 13, 2002, Order. A CPG is not an a la carte menu. As discussed above, Entergy will be bound by each and every one of the conditions of its CPG. In practice, there is no legitimate distinction between a CPG and the conditions it contains. As Entergy recognized in its Memorandum in Opposition, if Entergy does not agree with the terms of its CPG, then it is free to walk away from this deal. If it accepts the CPG, it must

24. Department March 16 Response at 1 (footnote omitted). We do not address the Department's cross-motion in today's Order. We will establish a separate briefing schedule with respect to the cross-motion.

25. CLF further observes that Entergy VY's existing CPG for SNF storage – the Docket 7082 CPG – includes this limitation.

26. CLF March 16 Response at 3.

abide by all its terms. Entergy recognized this explicitly during oral argument:

[I]f Entergy violates any conditions of the CPG or the MOU, [the Board and Department] have recourse against the company. You have the right to haul us in and take away the CPG if it's significant enough.²⁷

CLF contends that because a CPG that is continued under operation of 3 V.S.A. § 814(b) includes the conditions that accompany the CPG, the Docket 7082 CPG's prohibition on storage of SNF derived from post-March 21, 2012, operation remains in effect.

D. NEC

NEC asserts that the Board must deny Entergy VY's Declaratory Ruling Motion. NEC first notes the argument it set forth in a previous filing contending that the provisions of Section 814(b) are superseded by the more specific requirements of 10 V.S.A. § 6522(c)(5) and of the Docket 6545 Final Order and MOU. NEC further maintains that, even if Section 814(b) applies and the Docket 6545 CPG remains in effect, that CPG by its own terms expressly permits Entergy VY to own and operate Vermont Yankee past March 21, 2012, only for purposes of decommissioning.

NEC contends that continued operation of Vermont Yankee past March 21 will necessitate the construction of additional SNF storage facilities, but that the Board lacks the authority to issue a CPG for such facilities because 10 V.S.A. § 6522(c)(2) mandates that any Board-issued CPG for SNF facilities must limit the total amount of spent fuel to the amount derived from operation up to, but not beyond, March 21, 2012.

E. VNRC and CRWC

VNRC and CRWC contend that, even assuming 3 V.S.A. § 814(b) applies,²⁸ the Docket 6545 CPG does not authorize Entergy VY to generate power at Vermont Yankee past March 21, 2012. Instead, VNRC and CRWC claim that after March 21 Entergy VT is authorized by the CPG solely to decommission Vermont Yankee, and that Entergy VY agreed to this restriction. In

27. CLF March 16 Response at 6, *quoting (and omitting footnotes)* Docket 6545, Order of 7/11/02 at 26

28. In an earlier, March 7, 2012, filing, VNRC and CRWC observed that Section 814(b) may not apply in light of the subsequent enactment of provisions in Chapter 157 of Title 10, Vermont Statutes Annotated.

further support of their position, VNRC and CRWC point to Entergy VY's Petition in the instant docket, in which they claim "Entergy acknowledged '[t]he CPGs issued to EVY and ENO by this Board in Docket No. 6545 authorize these companies to operate the VY Station until March 21, 2012, at which time these companies are authorized only to decommission the VY Station.'"²⁹

VNRC and CRWC criticize Entergy VY for not seeking its requested declaratory ruling earlier and for not taking other steps to modify its existing CPG to allow operation past March 21, 2012. VNRC and CRWC also maintain that a Board declaration that Entergy VY must comply with the time-period limitations in the Docket 6545 CPG would not be federally preempted, as those limitations "do not interfere or conflict with the [Nuclear Regulatory Commission's] jurisdiction over radiological safety."³⁰

With respect to Entergy VY's second requested declaratory ruling concerning 10 V.S.A. § 6522(c)(2), VNRC and CRWC maintain that Section 6522(c)(2) "simply does not speak to Entergy's question about whether it requires legislative approval for storage of spent nuclear fuel generated after March 21, 2012."³¹ According to VNRC and CRWC, the Board must also consider other provisions of Chapter 157 of Title 10 that may require legislative approval.

Turning to Entergy VY's third requested ruling concerning 10 V.S.A. § 6501, VNRC and CRWC contend that the construction of additional dry casks to accommodate SNF derived from post-March 21, 2012, operation would appear to require approval under 30 V.S.A. § 248.

F. VPIRG

VPIRG, citing *Trybulski*, asserts that "[t]he Board lacks the authority to grant any order that does not limit the cumulative total amount of spent fuel stored at Vermont Yankee to the amount derived from the operation of the facility up to, but not beyond, March 21, 2012."³²

VPIRG disputes Entergy VY's claim that Section 814(b) allows it to continue to operate Vermont Yankee past March 21, 2012. VPIRG contends that if, pursuant to Section 814(b),

29. VNRC and CRWC March 16 Response at 4, *quoting* Entergy VY's Docket 7440 Petition at 1, ¶ 2.

30. VNRC and CRWC March 16 Response at 7.

31. VNRC and CRWC March 16 Response at 8.

32. VPIRG March 16 Response at 3.

Entergy VY's "existing license" remains in effect, one must examine the terms of that existing license – here, the Docket 6545 CPG. VPIRG maintains that the prohibition on post-March 21, 2012, operation in the Docket 6545 CPG and in the Docket 6545 Final Order was litigated and decided in Docket 6545, and that accordingly the doctrines of claim preclusion and issue preclusion bar Entergy VY from re-litigating these issues now.

IV. DISCUSSION

A. Entergy VY's First Requested Ruling: " Pursuant to 3 V.S.A. § 814(b), the Vermont Yankee Nuclear Power Station ("Vermont Yankee") may continue operating, and storing spent nuclear fuel derived from such operation, while its petition for a new or amended certificate of public good remains pending."

Ruling on this request requires consideration of the provisions of 3 V.S.A. § 814(b) and how those provisions apply to the restrictions on continued operation of Vermont Yankee after March 21, 2012, set forth in the Final Order and CPG in Docket 6545, in the Final Order and CPG in Docket 7082, and in Vermont statute.

Section 814(b) of Chapter 3, Vermont Statutes Annotated, provides:

When a licensee has made timely and sufficient application for the renewal of a license or a new license with reference to any activity of a continuing nature, the existing license does not expire until the application has been finally determined by the agency, and, in case the application is denied or the terms of the new license limited, until the last day for seeking review of the agency order or a later date fixed by order of the reviewing court.³³

For purposes of Section 814(b), "'License' includes the whole or part of any agency permit, certificate, approval, registration, charter, or similar form of permission required by law" 3 V.S.A. § 801(b)(3). By its express terms, then, Section 814(b) applies to licenses for "any activity of a continuing nature," and provides that any such existing license does not expire while a timely and sufficient application for a new or renewed license is pending.

Restrictions on Entergy VY's operation of Vermont Yankee past March 21, 2012, and storage of spent fuel derived from such operation, are contained in the following four documents: (1) the Docket 6545 CPG; (2) the Docket 6545 Final Order; (3) the Docket 7082 Final Order; and

33. VNRC and CRWC March 16 Response at 7.

(4) the Docket 7082 CPG. Restrictions on Entergy VY's operation of Vermont Yankee past March 21, 2012, and storage of spent fuel derived from such operation, are also set forth in Vermont statute.³⁴

Entergy VY's first requested declaratory ruling requires that we determine the effect of Section 814(b) regarding these restrictions on continued operation of Vermont Yankee. We begin with the Docket 6545 CPG. No party disputes that the Docket 6545 CPG constitutes a "license" for purposes of Section 814(b). It is also clear that Entergy VY has applied for a new or renewed Section 231 CPG, and that the application has not been finally determined by the Board. However, the Docket 6545 CPG does not by its own terms expire; moreover, as NEC has observed, it expressly contemplates and authorizes continued activities by Entergy VY subsequent to March 21, 2012. Entergy VY has not explained how Section 814(b) applies to a non-expiring CPG. Nonetheless, we conclude that Section 814(b) applies, because as used in Section 814(b) "license" includes "the whole or any part" of a permit, and because one "part" of the Docket 6545 CPG is the provision that authorization to operate Vermont Yankee expires on March 21, 2012. Thus, the "part" of the Docket 6545 CPG that authorizes operation of Vermont Yankee is extended pursuant to Section 814(b).

We turn next to the Docket 6545 Final Order. That Order approved the sale of Vermont Yankee to Entergy VY under 30 V.S.A. § 109, determined that a CPG should be issued to Entergy VY under 30 V.S.A. § 231, and approved the Docket 6545 MOU. The Board's Order included, among others, the following two conditions:

7. Pursuant to 30 V.S.A. § 231, a Certificate of Public Good, to expire on March 21, 2012, shall be issued to Entergy Nuclear Vermont Yankee, LLC to own the Vermont Yankee Nuclear Power Station and to Entergy Nuclear Operations, Inc. to operate the Vermont Yankee Nuclear Power Station as described in the foregoing findings.

8. Absent issuance of a new Certificate of Public Good or renewal of the Certificate of Public Good issued today, Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc. are prohibited from operating the Vermont Yankee Nuclear

34. An additional restriction was set forth in 10 V.S.A. § 6522(c)(4), requiring the Vermont General Assembly's approval for the storage of spent fuel derived from the operation of Vermont Yankee after March 21, 2012. That statutory provision was invalidated by the federal District Court's January 20, 2012, decision.

Power Station after March 21, 2012.³⁵

Condition 7 is the ordering clause for issuance of the Section 231 CPG to Entergy VY, and essentially restates the March 21, 2012, operational limitation from the CPG.³⁶

Condition 8, however, does not merely restate the CPG's expiration date for Entergy VY's authority to operate Vermont Yankee. Instead, Condition 8 is a condition, separate from the CPG, that expressly prohibits operation of Vermont Yankee after March 21, 2012, "[a]bsent *issuance* of a new Certificate of Public Good or *renewal* of the Certificate of Public Good issued today" ³⁷ Furthermore, the Docket 6545 Final Order not only addressed issuance of a Section 231 CPG to Entergy VY, it also approved the sale of Vermont Yankee to Entergy pursuant to 30 V.S.A. § 109. The Board's Section 109 approval of the sale of Vermont Yankee was the approval of a discrete transaction – the sale – and not the approval of a continuing activity (which is, instead, addressed by the Docket 6545 CPG). Accordingly, Condition 8 is a requirement of the order approving the sale of Vermont Yankee to Entergy VY, not part of the licensure of a continuing activity. Section 814(b) applies to licenses for an "activity of a continuing nature."

Entergy VY provided no support in its Declaratory Ruling Motion for the application of Section 814(b) to Condition 8 in the Docket 6545 Final Order.³⁸ However, subsequent to filing the motion, in a separate filing addressing other parties' responses to the Board's February 22 memorandum and issues raised at the March 9 status conference, Entergy VY contends that the term "license" as used in Section 814(b) applies to Condition 8. Entergy VY notes that the

35. Docket No. 6545, Order of 6/13/02 at 165.

36. In the July 11, 2002, Order re Motions to Alter or Amend, the Board modified the CPG such that the CPG no longer expired on March 21, 2012, but instead continued in effect, with Entergy VY "authorized to own and operate Vermont Yankee beyond March 21, 2012, solely for purposes of decommissioning." Docket No. 6545, Order of 7/1/02 at 17 (emphasis omitted).

37. Docket No. 6545, Order of 6/13/02 at 165 (emphasis added).

38. See Entergy VY Declaratory Ruling Motion, Attachment at 11–12, where Entergy VY is responding to a question in the Board's February 22 memorandum that asks, in relevant part, "How does the provision in 3 V.S.A. § 814 stating that an existing license does not expire while a timely and sufficient application for renewal is pending relate to these explicit commitments and orders? Specifically, do the Docket 6545 MOU and the Board's Orders (not the CPGs themselves) in Dockets 6545 and 6082 constitute 'licenses' within the meaning of Section 814?" Although Entergy VY begins its response by stating, "Section 814 of Title 3 applies by its express terms," Entergy VY provides no explanation of how Section 814 applies to the Docket 6545 *Order* as opposed to the CPG.

applicable definition, at 3 V.S. A. § 801(b)(3), defines "license" to include "the whole or part of any agency permit, certificate, approval, registration, charter, or similar form of permission required by law." Entergy VY maintains that "[t]he Board's order approving the sale of Vermont Yankee plainly qualifies as an 'approval' or 'similar form of permission required by law,'" and that accordingly Section 814(b) applies to Condition 8.³⁹

We conclude that this argument must fail for three reasons. First, the Board's Order approving the sale of Vermont Yankee under 30 V.S.A. § 109 was, in accordance with that statutory provision, an approval issued to the *former owners* of Vermont Yankee, *not* to Entergy VY. At the time of that approval, Section 109 provided:⁴⁰

Except in connection with replacement or exchange, *a corporation or a foreign corporation subject to the jurisdiction of the public service board, shall not make a sale* or lease or series of sales or leases in any one calendar year constituting 10 percent or more of the company's property located within this state and actually used in or required for public service operations nor merge nor consolidate pursuant to the provisions of sections 301-307 of this title, nor after any such sale, lease, consolidation, or merger shall any subsequent like action be taken, except after opportunity for hearing by the public service board and a finding by such board that the same will promote the general good of the state. Such notice of the hearing shall be given as the board directs. A certificate of consent of the public service board shall be filed with the secretary of state.

By the plain language of the statute, Section 109 requires the seller, not the buyer, to obtain Board approval. While such approval may be conditioned on agreements or other actions by the purchaser,⁴¹ Section 109 requires the seller to obtain the Board's consent. In contrast, a purchaser's "license" for the continued ownership and operation of the facility is a CPG issued pursuant to 30 V.S.A. § 102 or (as here) § 231.

In Docket 6545, the Board conditioned its approval under Section 109 of the sellers' sale

39. Entergy VY Further Response to the Questions Asked by the Board in its Memorandum Dated February 22, 2012, and to the Parties' Submissions in Response to These Questions ("Entergy VY Further Responses"), March 16, 2012, at 6.

40. The legislature has subsequently added further provisions to Section 109; the previous statutory language, which is set forth in this quote, remains and is now designated as subsection (a) of Section 109.

41. By way of example, if a company sought to sell for scrap a generation facility that required Section 109 approval, the Board might condition such approval on certain undertakings from the purchaser, such as measures to protect environmental quality during the dismantling of the facility, but no licensing requirements would apply to the purchaser.

of Vermont Yankee on the adoption of Condition 8, which had the effect of preserving the Board's ability to influence the operation of Vermont Yankee after the sale; the Board had such ability prior to the sale through its oversight of GMP and CVPS. In doing so, the Board relied on a commitment by Entergy VY that it would not continue to operate the facility if it had not obtained a new or renewed CPG by March 21, 2012. This Section 109 approval is an approval for the sellers to sell, and in no way constitutes an approval for the purchasers to operate the plant which is, instead, controlled by the Docket 6545 CPG.

Because Condition 8's prohibition on operation past March 21, 2012, without a new or renewed CPG is a condition of the approval of a discrete transaction – the sale of Vermont Yankee – and not of a continuing activity, 3 V.S.A. § 814(b) does not serve to excuse compliance with that condition. Furthermore, to change that prohibition would require a modification of the Docket 6545 Order that approved the sale, and not application for a new or renewed "license." Absent such modification, continued operation of Vermont Yankee after March 21 without a new or renewed CPG would violate that condition of the sale.

Second, even if this condition of the sale of Vermont Yankee could be construed to be a "license" for purposes of Section 814(b), Entergy VY has not sought modification of that condition by filing an appropriate motion or petition in Docket 6545, and thus has not filed for renewal of that "license" or modification of that "license."

Third, Entergy VY's proposed application of Section 814(b) would effectively render meaningless Condition 8 and Condition 3, in which we approved a similar provision of the Docket 6545 MOU.⁴² Condition 8 establishes a requirement, separate from the CPG, that prohibits post-March 21 operation of Vermont Yankee absent issuance of a new CPG or renewal of the existing CPG. The Docket 6545 MOU, which provided the genesis of Condition 8 and which the Board expressly approved in the Docket 6545 Final Order, unequivocally sets forth the agreement of Entergy VY and the other MOU signatories that "any Board order issuing a CPG to ENVY and ENO shall provide that the operation of VYNPA beyond March 21, 2012 shall be allowed only if application for renewal of authority under the CPG to operate the VYNPA is

42. As we stated above, today's Order does not address the application of Section 814(b) to the contractual commitment that Entergy VY made in the Docket 6545 MOU.

made *and granted*."⁴³ At the time that Docket 6545 MOU and Docket 6545 Final Order established the prohibition on continued operation past March 21, 2012, absent issuance of a new or renewed CPG, Section 814(b) of Title 10 read the same as it does today. To accept Entergy VY's claim that Section 814(b) overrides that prohibition would render meaningless that express prohibition in the MOU, and render Condition 8 superfluous in light of the CPG expiration date already set forth in Condition 7.

Thus, we conclude that 3 V.S.A. § 814(b) does not invalidate the express prohibition in Condition 8 against operation after March 21, 2012, without a new or renewed CPG.

In its first requested declaratory ruling, Entergy VY seeks a determination that Section 814(b) allows not only continued operation past March 21, 2012, but also storage of spent fuel from such continued operation. The Docket 7082 CPG, which authorized Entergy VY to construct the SNF facility, includes the following condition:

3. The cumulative total amount of spent nuclear fuel stored at Vermont Yankee is limited to the amount derived from the operation of the facility up to, but not beyond, the end of the current operating license, March 21, 2012. This capacity may include on-site storage capacity to accommodate full core offload or any order or requirement of the Nuclear Regulatory Commission with respect to the fuel derived from these operations.⁴⁴

The identical condition is included, as Condition 4, in the Final Order issued in Docket 7082.

Entergy VY provides the following analysis to support its request for a declaratory ruling that, pursuant to 3 V.S.A. § 814(b), it may store SNF derived from operation past March 21, 2012:

In addition, Entergy VY submitted a timely application for renewal of its CPG on March 3, 2008. Section 814(b) of Title 3, Vermont Statutes Annotated, provides that "[w]hen a licensee has made timely and sufficient application for the renewal of a license or a new license with reference to any activity of a continuing nature, the existing license does not expire until the application has been finally determined by the agency." The District Court interpreted this provision to mean that "Vermont law provides that a license subject to an agency's notice and hearing requirements does not expire until a final determination on an application for renewal has been made." District Court Decision at 8. Entergy VY timely submitted the petition four years ago, and after voluminous discovery requests,

43. Docket 6545 MOU at 6 (emphasis added).

44. Docket No. 7082, CPG issued 4/26/06 at 1.

resulting in the production of over 358,000 pages of documents by Entergy VY, ten technical hearings, and briefing, its petition has not yet been finally determined by the Board (presumably because the Board was barred from doing so under a state statute that the District Court Decision has now invalidated), thus bringing it within Section 814(b)'s provision that a timely and sufficient application has been made but not finally determined.⁴⁵

In its subsequent March 16 filing, Entergy VY further maintains that "the accumulation of SNF beyond a specified quantity is just as much such 'activity of a continuing nature' as is ongoing operation beyond a specified date. Moreover, the limitation in Vermont Yankee's CPG *is* linked to a date, namely March 21, 2012; the limitation was not phrased, for example, in terms of a specific *number* of SNF casks."⁴⁶

We find numerous flaws in Entergy VY's argument. First, the continuing activity subject to the Docket 7082 CPG is the storage of SNF, not the accumulation of ever-increasing amounts of SNF. This is apparent on the face of the Docket 7082 CPG by virtue of the very condition at issue here: the limitation on the cumulative amount of SNF authorized by the CPG. The authorization for the continuing activity of storing SNF does not expire, and thus there is no expiring license to which Section 814(b) might apply.

Second, even if Section 814(b) somehow did apply, Condition 3 of the Docket 7082 CPG establishes a limit on the total amount of SNF that may be stored at Vermont Yankee. Entergy VY seeks to use Section 814(b) to expand the scope of the authorized storage activity beyond that which is currently authorized. Not only does Entergy VY fail to provide any support for the proposition that Section 814(b) allows the expansion of the licensed activity, but also such an interpretation is contradicted by the plain language of Section 814(b), which states: ". . . the *existing license* does not expire until the application has been finally determined by the agency" (Emphasis added.) The existing license – the Docket 7082 CPG – limits the amount of SNF that may be stored at Vermont Yankee. Thus, even if Section 814(b) somehow were construed to apply to the non-expiring Docket 7082 CPG, it would serve to keep in place that CPG, including the quantitative limit established in Condition 3.

Third, Vermont state law clearly separates authorization for operation of Vermont Yankee

45. Entergy VY Declaratory Ruling Motion, Attachment at 9.

46. Entergy VY's Further Response at 6 (footnote omitted, emphasis in original).

from authorization for storage of SNF derived from that operation. As explained below, this Board lacks authority under state law to approve the storage of an amount of SNF beyond that derived from operation of Vermont Yankee through March 21, 2012. Accordingly, Entergy VY's Petition in this proceeding did not request the Board to amend the Docket 7082 CPG to expand the amount of SNF that may be stored at Vermont Yankee. The Petition instead requested approval for such expansion from the Vermont General Assembly. The Petition provides, in relevant part:

This is a petition by Entergy Nuclear Vermont Yankee, LLC ("EVY"), and Entergy Nuclear Operations, Inc. ("ENO") (collectively with EVY, "Entergy VY"), for such approvals from this Board and the Vermont General Assembly as may be required to operate the Vermont Yankee Nuclear Power Station ("VY Station") after March 21, 2012.

. . .

5. As continued operation of the VY Station will require storage of spent-nuclear fuel generated after March 21, 2012, at the VY Station, such petition also requires the General Assembly's approval under Chapter 157 of Title 10, Vermont Statutes Annotated.⁴⁷

Section 814(b) does not apply to approvals from the General Assembly. Under 3 V.S.A. § 801(b)(1), the legislature is expressly excluded from the definition of "agency," and under 3 V.S.A. § 801(b)(3), "license" is limited to approvals issued by agencies. Thus, approval by the General Assembly for expanded SNF is not a "license" for purposes of Section 814(b). Therefore, and because Entergy VY's Petition, in accordance with state law, sought legislative (rather than Board) approval for expanded SNF storage, it has *not* "made timely and sufficient application for the renewal of a license or a new license" for expanded SNF storage.⁴⁸

Even if we were to treat Entergy VY's Petition as seeking approval from the Board for expanded SNF storage, the Petition would not qualify as "sufficient application" for purposes of

47. Entergy VY Petition, March 3, 2008, at 1, 2.

48. Similarly, the license-extension effect of Section 814(b) only extends "until the application has been finally determined by the *agency*, and, in case the application is denied or the terms of the new license limited, until the last day for seeking review of the *agency order* or a later date fixed by order of the reviewing court." These provisions further reinforce the clear legislative intent that Section 814(b) does not apply to legislative approvals.

Section 814(b) because the Board lacks the authority under state law to issue such approval. The Vermont statutory requirements for approval of the storage of radioactive materials are set forth in Chapter 157 of Title 3, Vermont Statutes Annotated. The Vermont legislature enacted Chapter 157 in 1977.⁴⁹ The first section in Chapter 157 – Section 6501 – provides in relevant part that:

(a) No facility for deposit, storage, reprocessing or disposal of spent nuclear fuel elements or radioactive waste material shall be constructed or established in the state of Vermont unless the general assembly first finds that it promotes the general good of the state and approves, through either bill or joint resolution, a petition for approval of the facility. No facility for the incineration of low-level radioactive waste, as defined in subdivision 7001(7) of this title, shall be constructed or established without a similar finding and approval.

Prior to 2005, the Board had no authority to approve the storage of radioactive materials; only the legislature had that authority, pursuant to Section 6501. But in 2005, the General Assembly passed Act 74 (P. A. No. 74, (2005 Vt., Bien. Sess.)). Act 74 added subchapter 2 to Chapter 157. Subchapter 2 consisted of three sections: 6521, 6522, and 6523. Under newly enacted Section 6522, the Board for the first time was given authority to approve the construction or establishment of an SNF facility. In its entirety, Section 6522 provides as follows:

(a) Neither the owners of Vermont Yankee nor their successors and assigns shall commence construction or establishment of any new storage facility for spent nuclear fuel before receiving a certificate of public good from the public service board pursuant to 30 V.S.A. § 248. Standards generally applicable to substantial modification of facilities with certificates of public good under 30 V.S.A. § 248 shall apply to any future alterations of any permitted facility.

(b) In addition to all other applicable criteria of 30 V.S.A. § 248, before granting a certificate of public good for a new or altered spent nuclear fuel facility, the public service board shall find that:

(1) Adequate financial assurance exists for the management of spent fuel at Vermont Yankee for a time period reasonably expected to be necessary, including through decommissioning, and for as long as it is located in the state.

(2) The applicant has made commitments to remove all spent fuel from Vermont to a federally certified long-term storage facility in a timely manner, consistent with applicable federal standards.

49. P. A. No. 77 (1977 Vt., Bien. Sess.).

(3) The applicant has developed and will implement a spent fuel management plan that will facilitate the eventual removal of those wastes in an efficient manner.

(4) The applicant is in substantial compliance with any memoranda of understanding entered between the state and the applicant.

(c) In addition, the following limiting conditions shall apply:

(1) Any certificate of public good issued by the board shall permit storage only of spent fuel that is derived from the operation of Vermont Yankee, and not from any other source.

(2) Any certificate of public good issued by the board shall limit the cumulative total amount of spent fuel stored at Vermont Yankee to the amount derived from the operation of the facility up to, but not beyond, March 21, 2012, the end of the current operating license. Authorized capacity may include on-site storage capacity to accommodate full core offload or any order or requirement of the Nuclear Regulatory Commission with respect to the fuel derived from these operations.

(3) The requirement to obtain a certificate of public good from the board for this purpose applies to Vermont Yankee, regardless of who owns the facility, and the conditions of the certificate of public good and the requirements of this subchapter will apply to any future owner.

(4) Compliance with the provisions of this subchapter shall constitute compliance with the provisions of this chapter that require that approval be obtained from the general assembly before construction or establishment of a facility for the deposit or storage of spent nuclear fuel, but only to the extent specified in this subchapter or authorized under this subchapter. The public service board is authorized to hear and issue a certificate of public good for such a facility under 30 V.S.A. § 248, to the extent specified or authorized in this subchapter. Other agencies of the state also may receive and act on applications related to the construction or establishment of such a facility, provided that any approval for such a facility applies only to the extent specified or authorized in this subchapter. Storage of spent fuel derived from the operation of Vermont Yankee after March 21, 2012 shall require the approval of the general assembly under this chapter.

(5) Compliance with the provisions of this subchapter shall not confer any expectation or entitlement to continued operation of Vermont Yankee following the expiration of its current operating license on March 21, 2012. Before the owners of the generation facility may operate the generation facility beyond that date, they must first obtain a certificate of public good from the public service board under Title 30.⁵⁰

The Vermont legislature strictly limited the Board as to the cumulative amount of SNF that a Board-issued CPG could authorize. Section 6522(c)(2) mandated that such a CPG "shall limit the cumulative total amount of spent fuel stored at Vermont Yankee to the amount derived from the operation of the facility up to, but not beyond, March 21, 2012, the end of the current operating license."

It has long been established that the Board is a body of limited jurisdiction. In the seminal *Trybulski* case the Vermont Supreme Court held that:

The Public Service [Board] is an administrative body, clothed in some respects with quasi judicial functions, authorized in the exercise of the police power to make rules and regulations required by the public safety and convenience and to determine facts upon which existing laws shall operate, and having, in a sense, auxiliary or subordinate legislative powers which have been delegated to it by the General Assembly. It is a body exercising special and statutory powers not according to the course of the common law, *as to which nothing will be presumed in favor of its jurisdiction. It has only such powers as are expressly conferred upon it by the Legislature, together with such incidental powers expressly granted or necessarily implied as are necessary to the full exercise of those granted, and it is merely an administrative board created by the State for carrying into effect the will of the State as expressed by its legislation.*⁵¹

Because the legislature's grant of authority to the Board to approve the storage of SNF at Vermont Yankee was strictly limited "to the amount derived from the operation of the facility up to, but not beyond, March 21, 2012," the Board lacks the authority under state law to authorize expanded use of the facility for storage of SNF derived from the operation of the facility past March 21, 2012.

Both Entergy VY and the Department contend that the Board has the requisite authority under 30 V.S.A. § 231 to approve storage of SNF derived from post-March 21, 2012, operation.

50. The federal District Court's Decision invalidated the last sentence of Section 6522(c)(4).

51. *Trybulski* at 7 (citations omitted)(emphasis added).

We agree that it is within our statutory authority under Section 231 to issue a CPG that authorized a *company* to own and operate an SNF storage facility, and that we could issue such a CPG under Section 231 to Entergy VY that does not include a limitation on the cumulative amount of SNF that Entergy VY may amass at Vermont Yankee. However, a Section 231 CPG governs a company, not a physical facility. The permitting for an SNF facility is governed by Chapter 157 and by Section 248 (which is limited by Chapter 157), not Section 231.

Thus, Section 231 does not provide the Board the authority that the legislature in Chapter 157 initially reserved to itself to approve the construction or establishment of an SNF facility, and that the legislature subsequently (through Act 74) delegated in part and subject to strict limitation to the Board. Nor does Section 231 in any way provide this Board with the authority to modify the Docket 7082 CPG issued pursuant to the separate and distinct statutory provisions of 10 V.S.A. § 6522 and 30 V.S.A. § 248, particularly in a manner that would override the express legislative limitation set forth in Section 6522.

For these reasons we conclude that under state law we lack the authority to remove the Docket 7082 CPG's cumulative limit on SNF that may be stored at Vermont Yankee.

In conclusion, we deny Entergy VY's first requested declaratory ruling because, for the reasons set forth above, 3 V.S.A. § 814(b) does not provide authority for Vermont Yankee to continue operating, and storing spent nuclear fuel derived from such operation, while Entergy VY's petition for a new or amended CPG remains pending.⁵²

B. Entergy VY's Second Requested Ruling: "10 V.S.A. § 6522(c)(2) does not require that the General Assembly approve the storage of spent nuclear fuel derived from post-March 21, 2012 operation of Vermont Yankee."

Section 6522(c)(2) provides that

Any certificate of public good issued by the board shall limit the cumulative total amount of spent fuel stored at Vermont Yankee to the amount derived from the operation of the facility up to, but not beyond, March 21, 2012, the end of the current operating license. Authorized capacity may include on-site storage capacity to accommodate full core offload or any order or requirement of the

52. We need not, and thus do not, address VPIRG's arguments of issue preclusion and claim preclusion, in light of the determination that we have reached on other grounds.

Nuclear Regulatory Commission with respect to the fuel derived from these operations.

At first blush this may appear to be a relatively straightforward ruling, because the language of Section 6522(c) says nothing about approval – legislative or any other – for storage of amounts of SNF derived from post-March 21 operation.⁵³ However, we conclude that it would be inappropriate for the Board to rule on this question. Entergy VY has not explained how this Board has subject-matter jurisdiction to issue a declaratory ruling regarding the need for *General Assembly* approval. *See, In re Appeal of Village of Morrisville Water & Light Department*, 184 Vt. 616, 958 A.2d 1191 (2008) (Public Service Board lacks power to issue declaratory ruling outside its subject-matter jurisdiction) (hereinafter referred to as "*Morrisville Water & Light*"). Because Entergy VY's requested ruling concerns possible General Assembly approval over which the Board lacks jurisdiction, we conclude that we lack the authority to rule on the declaratory ruling request. Therefore, we deny Entergy VY's second requested declaratory ruling.

C. Entergy VY's Third Requested Ruling: "10 V.S.A. § 6501 does not apply because petitioners do not presently propose to construct or establish a new facility for the storage of spent nuclear fuel at the Vermont Yankee site."

Here also Entergy VY has not established Board subject-matter jurisdiction for this requested declaratory ruling, which again concerns a legislative-approval process. *See, Morrisville Water & Light*. Therefore, we deny Entergy VY's third requested declaratory ruling.

V. CONCLUSION

Entergy VY has filed a Declaratory Ruling Motion that requires the Board to interpret and apply provisions of Vermont state law. We have done so in full recognition of the federal District Court's decision. Thus, in rendering today's decision we have applied the relevant provisions of state law that have not been preempted or enjoined by the federal District Court.

We are mindful of the Department's contention that the District Court's decision serves to enjoin the Board from enforcing orders that would require cessation of operations at Vermont

53. This does not, of course, necessarily mean that there are no statutory provisions other than the one singled out in Entergy VY's requested ruling that pertain to General Assembly approval.

Yankee. Our Order today does not have that effect. Today's Order does not purport nor is intended to require that Entergy VY cease operations at Vermont Yankee. That is not the issue that Entergy VY has brought before the Board. What is before the Board, and what this Order addresses, is Entergy VY's motion that we issue declaratory rulings on how certain provisions of Vermont state law apply to continued operation and SNF storage.

We deny Entergy VY's Declaratory Ruling Motion for the reasons set forth in Section IV of this Order.

SO ORDERED.

Dated at Montpelier, Vermont, this 19th day of March, 2012.

<u>s/ James Volz</u>)	
)	
)	PUBLIC SERVICE
<u>s/ David C. Coen</u>)	
)	BOARD
)	
)	OF VERMONT
<u>s/ John D. Burke</u>)	

OFFICE OF THE CLERK

FILED: March 19, 2012

ATTEST: s/ Susan M. Hudson
Clerk of the Board

NOTICE TO READERS: This decision is subject to revision of technical errors. Readers are requested to notify the Clerk of the Board (by e-mail, telephone, or in writing) of any apparent errors, in order that any necessary corrections may be made. (E-mail address: psb.clerk@state.vt.us)